(2)

No. 90-72

In The

Supreme Court of the United States

October Term, 1990

JUDY C. BROWN AND LEWIS F. BROWN, INDIVIDUALLY AND AS NEXT FRIENDS OF REIDER P. M. BROWN, A MINOR, AND REISE G. L. BROWN, A MINOR, DECEASED,

Petitioners,

vs.

ANDY GRANATELLI, AS TRUSTEE OF TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN; THE TUNEUP MASTERS, INC. EMPLOYEE BENEFIT PLAN, AND NORTH AMERICAN LIFE AND CASUALTY COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners are precluded from asserting that the Plan and its Trustee are liable for the medical expenses of Reider and Reise Brown when Petitioners have conceded in the lower courts that Tex. Ins. Code Ann. Art. 3.70-2(E) does not apply to the Plan and that if Art. 3.70-2(E) did apply directly to the Plan, its application would be preempted by the Employee Retirement Income Security Act.

2. Whether Section 514 of the Employee Retirement Income Security Act preempts the application and enforcement of Tex. Ins. Code Ann. Art. 3.70-2(E) to a self-insured employee health benefit plan.

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STATEMENT OF THE CASE

Since 1980, TuneUp Masters, Inc. ("TuneUp Masters")[1] has maintained a self-insured health plan for certain employees and their beneficiaries as defined therein. TuneUp Masters, Inc. purchased excess or "stop-loss" coverage from North American Life and Casualty Company ("NALAC"). Under the contract with NALAC, NALAC reimburses the Plan for claims the Plan pays which exceed $30,000 for any plan participant or beneficiary during the contract year.

In 1985, the Plan was amended in response to escalating medical costs, including the large expenses of premature births which would likely affect TuneUp Masters' ability to maintain its plan for the benefit of all of its covered employees. The plan amendment, among other things, established a 30-day waiting period for coverage of newborns and made newborn coverage subject to the pre-existing limitation provisions of the Plan. The plan amendment was described in a 1985 Summary Plan Description ("SPD"), which was then distributed to employees.

In January of 1986, Judy C. Brown gave birth to a child who, according to medical claims submitted by Lewis Brown (one of TuneUp Masters's employees who had received a copy of the 1985 SPD), was born prematurely and required and was given extensive medical care and treatment. As medical bills were received by the

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[1] The holding company for TuneUp Masters is XPERT/TUM Acquisition, Inc. TuneUp Masters does not have any non-wholly owned subsidiaries.

Plan they were denied because the expenses either were incurred during the 30-day waiting period or because of the child's pre-existing disabilities and hospital confinement. In November of 1986, Judy C. Brown gave birth to another child who, according to medical claims submitted by Lewis Brown, was born prematurely, had birth defects and required and was given extensive medical care and treatment. Similarly with respect to the second child, as medical bills were received by the Plan they were denied for the same reasons.

Petitioners filed suit in state court against, among others, the Plan and Mr. Granatelli. The defendants removed the case to federal district court because of the federal question involved. Petitioners subsequently amended their Complaint to assert claims against only the Plan and Mr. Granatelli, as Trustee of the Plan, and added NALAC as a defendant.

The parties stipulated that there were no genuine issues of material fact and moved for summary judgment. Petitioners conceded that Tex. Ins. Code Ann. Art. 3.70-2(E) does not apply to the Plan itself. (See Petition for Writ of Certiorari, Appendix B, p. 19a). Tex. Ins. Code Ann. Art. 3.70-2(E) provides:

> No individual policy or group policy of accident or sickness insurance, including policies issued by companies subject to Chapter 20, Texas Insurance Code, as amended, delivered or issued for delivery to any person in this state which provides for accident and sickness coverage of additional newborn children or maternity benefits, may be issued in this state if it contains any provision excluding or limiting initial coverage of a newborn infant for a period of time, or

limitations or exclusions for congenital defects of a newborn child.

After due consideration of the parties' motions, the District Court granted summary judgment to the Plan, its Trustee, and NALAC and denied Petitioners' motion for summary judgment which contended that the Plan was, among other things, structurally defective.

On appeal, Petitioner admitted that if Art. 3.70-2(E) applied directly to employee benefit plans, its application would be preempted by ERISA. (See Petition for Writ of Certiorari, Appendix A, pp. 3a-4a). The Fifth Circuit, after hearing oral argument, rendered its judgment on April 11, 1990, affirming the judgment of the district court. *Brown v. Granatelli*, 897 F.2d 1351 (5th Cir. 1990).

SUMMARY OF ARGUMENT

Respondents Andy Granatelli, Trustee of the TuneUp Masters, Inc. Employee Benefit Plan, and the TuneUp Masters, Inc. Employee Benefit Plan respectfully submit (1) that this case does not raise a federal question warranting review by the Court, 2) that the Circuit Courts that have considered the issue whether ERISA preempts state insurance laws that attempt to mandate the injuries and illnesses to be covered by self-insured employee health benefit plans, have decided that such state laws are preempted by ERISA and (3) that the law in those Circuits that have considered this issue is consistent with the precedent of the Court and Section 514 of ERISA. Accordingly, Respondents respectfully submit that Petitioners' Petition For Writ of Certiorari should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS IN ACCORD WITH GOVERNING STATUTORY LAW AND THE PRECEDENT OF THIS COURT

ERISA preempts all state laws that attempt to regulate the content of employee benefit plans. Section 514 of ERISA provides, in part:

> **[The Preemption Clause]**
>
> Except as provided in subsection (b) of this section [the Saving Clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975. [Section 514(a), as set forth in 29 U.S.C. § 1144(a)].
>
> **[The Saving Clause]**
>
> Except as provided in subparagraph (B) [the Deemer Clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. [Section 514(b)(2)(A), as set forth in 29 U.S.C. § 1144(b)(2)(A)].
>
> **[The Deemer Clause]**
>
> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or

> to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. [Section 514(b)(2)(B), as set forth in 29 U.S.C. 1144(b)(2)(B)].

Thus, if a state law relates to an employee benefit plan it is preempted, unless the law regulates an insurance company engaged in the business of insurance; however, state law cannot regulate an employee benefit plan by deeming the plan to be an insurance company or engaged in the business of insurance, unless such plan's primary purpose is to provide death benefits (*i.e.*, life insurance). Since the plan at issue in this case does not provide death benefits, the Deemer Clause protects this plan from state regulation.

In *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court decided the question whether ERISA preempts a Massachusetts statute requiring insurance companies to provide mental-health coverage in certain types of insurance policies. Although the Massachusetts statute was drafted broadly enough to require that self-insured plans provide the mandated mental-health benefits, "[i]n light of ERISA's 'deemer clause,' § 514(b)(2)(B), 29 USC § 1144(b)(2)(B) [29 USCS § 1144(b)(2)(B)], which states that a benefit plan shall not 'be deemed an insurance company' for purposes of the insurance saving clause, Massachusetts has never tried to enforce § 47B [the mental-health coverage mandate] as applied to benefit plans directly, effectively conceding that such an application of § 47B would be preempted by ERISA's pre-emption clause, § 514(a), 29 USC § 1144(a)

[29 USCS § 1144(a)]." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 735 n.14. Although the Court did hold that the State of Massachusetts could regulate insurance companies and the content of the insurance policies that the insurance companies sell, the Court noted that the effect of the Deemer Clause is that the insurance Saving Clause cannot be used to regulate an employee benefit plan. 471 U.S. at 747 n.25.

Thus, the Fifth Circuit's decision that Tex. Ins. Code Ann. Art. 3.70-2(E) cannot be applied to the Plan and its Trustee is consistent with governing statutory law and the precedent of this Court.

Moreover, Petitioners admitted in the District Court and in the Fifth Circuit that Art. 3.70-2(E) does not apply to the Plan itself and that if Art. 3.70-2(E) applied directly to the Plan, its application would be preempted by ERISA. Accordingly, Respondents respectfully submit that Petitioners' Petition for a Writ of Certiorari is due to be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS – STATE INSURANCE LAWS CANNOT MANDATE THOSE INJURIES AND ILLNESSES TO BE COVERED BY SELF-INSURED EMPLOYEE HEALTH BENEFIT PLANS

Contrary to Petitioners' assertion, there is no conflict among the Sixth, Ninth and Fifth Circuits on the question whether state insurance law may mandate the injuries and illnesses covered by an employee health benefit plan. Petitioners cite *Michigan United Food & Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985),

cert. denied, 474 U.S. 1059 (1986), and *Moore v. Provident Life & Accident Insurance Co.*, 786 F.2d 922 (9th Cir. 1986), as the basis for their assertion that there is such a conflict.

The Sixth Circuit's *Baerwaldt* decision is not in conflict with the Ninth Circuit's *Moore* decision or the Fifth Circuit's decision in this case. The *Baerwaldt* case involved the application of a state mandated coverage requirement to a group health insurance contract; whereas the *Moore* case involved the application of a state law claims processing requirement to an employee health benefit plan, and the plan's third party administrator and the "stop-loss" carrier.

Furthermore, the law in the Sixth Circuit is exactly the same as the law in the Fifth Circuit – namely, that state laws which regulate the content of employee benefit plans are preempted by ERISA. *Liberty Mut. Ins. Group v. Iron Workers Health Fund*, 879 F.2d 1384 (6th Cir. 1989). Accordingly, Petitioners' reliance on the Sixth Circuit's decision in *Baerwaldt*, is misplaced.

In *Baerwaldt*, the sole ERISA issue before the court was whether a Michigan insurance statute could be applied to group health insurance policies sold by an insurance company to employee benefit plans. Michigan Public Act No. 429 requires each insurer offering group and individual health insurance policies within the State of Michigan to include substance abuse coverage within those policies. Two employee benefit plans and their trustees sued the Michigan Bureau of Insurance, Michigan's Commissioner of Insurance and the Deputy Commissioners of Insurance for declaratory and injunctive relief. The lawsuit was triggered by the insurer's telling

the plans of the insurer's concern that the insurer would lose its ability to do business in Michigan unless the health plans were amended to include coverage for substance abuse. Although the Sixth Circuit did hold that Act No. 429 could be applied to the insurer's group health insurance policies, the court did not hold that Act No. 429 could be applied to the plans themselves. The court's comment that the "stop-loss" nature of the plans did not alter the court's conclusion does not mean that the court held that Act No. 429 could be applied to the plans themselves. The comment means merely that the "stop-loss" nature of the plans did not prevent the State of Michigan from applying Act No. 429 to the insurer's group health insurance policies.

The Sixth Circuit's *Baerwaldt* decision is not in conflict with the Ninth Circuit's *Moore* decision. In *Moore*, a former employee sued his former employer, the insurance company which provided administrative services and "stop-loss" coverage for the employer's employee health benefit plan, the Administrator of the plan and the Trustees of the plan for breach of covenant of good faith and fair dealing, fraud, breach of fiduciary duties under California law and ERISA, and violation of California Insurance Code § 790.03. Although the terms and provisions of the health benefit plan were drawn from a group health policy used by the insurance company, the insurance company's undertaking was merely to provide administrative services (*i.e.*, determining benefits and paying claims from the plan's trust fund) for the plan and to reimburse the plan's trust fund after the trust fund had paid a specified aggregate amount of claims. Since the specified aggregate amount of paid claims was not

reached by the trust fund, the insurance company did not have an obligation to reimburse the trust fund during the period when Moore's claims were being made. In addition to holding that the Deemer Clause of ERISA bars the application of the Saving Clause of ERISA to an employee benefit plan, the court held that Moore's common law causes of action were preempted by ERISA. Also, the court held that California Insurance Code § 790.03 was preempted by ERISA because it did not regulate the business of insurance in that the statute has nothing to do with the spreading of risks, but is simply directed at administrative claims processing. Moreover, the court held that the state law claims against the insurance company (for purely administrative claims processing functions) were not based on laws regulating the activities of an insurance company engaged in the business of insurance.

Since *Baerwaldt*, the Sixth Circuit has issued a series of decisions clarifying the law. In the Sixth Circuit, state laws which attempt to mandate those injuries and illnesses to be covered by employee health benefit plans are preempted by ERISA.

When this case was before the Fifth Circuit and the district court, petitioners cited the Sixth Circuit's decision in *Northern Group Services v. Auto Owners Insurance Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), for the proposition that state statutes regulating the types of coverage required in certain insurance policies are not preempted by ERISA even as applied to employee health benefit plans. *Northern Group Services* involved the narrow issue whether a Michigan no-fault automobile insurance law requiring that automobile

insurance policies contain coordination of benefit provisions could be preempted by ERISA to the extent such state law conflicts with coordination of benefit rules contained in certain employee health benefit plans. Coordination of benefit rules determine who pays first when multiple coverages apply to the same injury or illness. Under Michigan law, no-fault automobile insurance coverage is secondary to other health and accident coverage. The court held that ERISA did not necessarily preempt the entire field of such coordination of benefit rules and remanded the case to the district court. The Sixth Circuit, drawing a distinction between state laws that regulate the content of a plan and state laws that may merely affect the order of payment from a plan, pointed out at 833 F.2d at 93 that its decision did not apply to state laws that attempt to mandate the types of coverage provided by an employee benefit plan, which laws remain preempted by ERISA. On remand, the district court held that the Sixth Circuit had ruled that Michigan's coordination of benefit rules apply to self-insured health benefit plans as a matter of state law. The case was again appealed to the Sixth Circuit. The Sixth Circuit reversed the trial court and stated that the Sixth Circuit's earlier decision in *Northern Group Services* had not decided the issue whether Michigan's coordination of benefit rules apply to self-insured health plans. *Northern Group Servs. v. State Farm Mut. Auto. Ins. Co.*, 898 F.2d 1125 (6th Cir. 1990).

Before issuing its second decision in *Northern Group Services*, the Sixth Circuit had already confronted the question whether ERISA preempts the application of state mandated coverage laws to employee health benefit plans. In *Liberty Mutual Insurance Group v. Iron Workers*

Health Fund, 879 F.2d 1384 (6th Cir. 1989), an insurance company that had issued a no-fault automobile policy sued an employee health benefit plan which specifically excluded coverage for expenses resulting from automobile accidents. The insurance company argued that Michigan's automobile no-fault coordination of benefit provision (the same one at issue in the *Northern Group Services, Inc.* case) not only requires other health and accident coverage providers to pay first, but also prohibits employee health benefit plans from excluding coverage for expenses resulting from automobile accidents. The Sixth Circuit stated that if the Michigan Supreme Court were to interpret that the no-fault insurance law required employee benefit plans to provide coverage for automobile accident injuries, such state law would be preempted by ERISA. Thus, the Fifth Circuit's decision in this case is consistent with the law of the Sixth Circuit.

While the Court has granted a Petition for a Writ of Certiorari in *FMC v. Holliday*, 885 F.2d 79 (3d Cir. 1989), *cert. granted*, 58 U.S.L.W. 3513 (U.S. February 20, 1990) (No. 89-1048), Respondents respectfully submit that the Third Circuit's decision in that case does not create a conflict between the Third and Fifth Circuits on the issues presented in this case. In *FMC*, a child of an employee of FMC Corporation ("FMC") was injured in an automobile accident. FMC's self-insured health plan contained a subrogation clause requiring, among other things, the execution of a reimbursement agreement before the plan would process claims where there was potential liability on the part of a third-party. Thus, to obtain reimbursement from the plan for his child's injuries, the employee signed a third-party reimbursement form. The plan then paid the

medical expenses incurred on behalf of the child. When the plan discovered that the employee had initiated a negligence action, the plan notified the employee that the plan intended to pursue its subrogation rights. The employee responded that 75 Pa. Cons. Stat. Ann. § 1720 of the Pennsylvania Motor Vehicle Law prohibits such subrogation. Section 1720 provides:

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits in lieu thereof paid or payable under section 1719 (relating to coordination of benefits).

FMC responded by bringing an action seeking a declaratory judgment that it was entitled to subrogation.

The district court held that FMC's subrogation claim was barred by § 1720 and that § 1720 was not preempted by ERISA.

On appeal, the Third Circuit held that § 1720 applied to FMC's health plan. Also, the Third Circuit held that although § 1720 relates to employee benefit plans within the meaning of ERISA, § 1720 is saved from preemption under ERISA's Saving Clause because § 1720 regulates insurance contracts. Moreover, relying on the Sixth Circuit's first decision in *Northern Group Services*, the Third Circuit held that the Deemer Clause does not bar the application of § 1720 to self-insured health plans because subrogation is not a core ERISA concern.

Importantly, *FMC* was argued in the Third Circuit just six days after the Sixth Circuit's decision in *Liberty Mutual Insurance Group*. Also, *FMC* was decided by the Third Circuit long before the Sixth Circuit issued its second decision in *Northern Group Services*. Thus, the Third Circuit may have read more into the Sixth Circuit's first decision in *Northern Group Services* than the Sixth Circuit had originally intended (as did the district court on the first remand of *Northern Group Services)*. Moreover, since *FMC* does not involve the issue whether state insurance laws can mandate those injuries and illnesses to be covered by an employee health benefit plan, the Third Circuit could decide, as has the Sixth Circuit, that ERISA preempts state insurance laws that mandate those injuries and illnesses to be covered by an employee health benefit plan. Finally, *FMC* is distinguishable from this case because (1) Petitioners have conceded in the district court and in the Fifth Circuit that Tex. Ins. Code Ann. Art. 3.70-2(E) does not apply to the plan itself and (2) the Fifth Circuit has held that Tex. Ins. Code Ann. Art. 3.70-2(E) does not cover "stop-loss" insurance contracts. Accordingly, Respondents respectfully submit that Petitioners' concession obviated a decision on the federal preemption issue and that the Fifth Circuit's decision on the scope of Art. 3.70-2(E) does not raise an issue warranting review by the Court.

III. PETITIONERS' CONTENTION THAT THE USE OF PLAN ASSETS TO PURCHASE "STOP-LOSS" COVERAGE IS A PER SE VIOLATION OF ERISA DOES NOT WARRANT REVIEW

In the District Court, Petitioners neither raised nor proved their current contention that it is illegal for plan

assets to be used to purchase "stop-loss" coverage. Accordingly, Respondents respectfully submit that Petitioners' contention does not warrant the granting of a Writ of Certiorari. *Youakim v. Miller*, 425 U.S. 231 (1976).

Moreover, Petitioners have not provided and cannot provide any logical argument or any authority that supports their contention that 29 U.S.C. § 1103(c)(1)[2] is violated by using plan assets to purchase "stop-loss" coverage. "Stop-loss coverage protects the financial viability of a self-insured employee health benefit plan by reimbursing the plan for catastrophic losses.

IV. CONCLUSION

Respondents Andy Granatelli, Trustee of the TuneUp Masters, Inc. Employee Benefit Plan, and the TuneUp Masters, Inc. Employee Benefit Plan respectfully pray that the Petition for Writ of Certiorari be denied. There is no conflict among the Circuit Courts regarding whether a state mandated coverage law may be applied to self-insured employee health benefit plans. Moreover, the

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[2] 29 U.S.C. § 1103(c)(1) provides:

> Except as provided in paragraph (2), (3) or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Fifth Circuit's decision in this case is in accord with the precedent of this Court. Accordingly, Respondents respectfully submit that there is no special or important reason to grant a Writ of Certiorari and that Petitioners' Petition should be denied.

Respectfully submitted,

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